IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.21 of 1995

For Approval and Signature:

HON'BLE SMT.JUSTICE ABHILASHA KUMARI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant
Versus
ZINZUWADIA MAHIPAT L KOLI - Respondent

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Appearance :
MR LB DABHI, ADDL. PUBLIC PROSECUTOR for Appellant
MR HARDIK S.SONI FOR MR HARIN P RAVAL for Respondent

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CORAM : HON'BLE SMT. JUSTICE ABHILASHA KUMARI

Date : 14/09/2007

ORAL JUDGMENT

1. The present Appeal is directed against the judgment and order of the learned Judicial Magistrate, First Class, Kalawad, dated 6th October, 1994, rendered in Criminal Case No.280 of 1993, whereby, the respondent (original accused) has been acquitted of

the offences punishable under Sections 323 and 504 of the Indian Penal Code, and Section 135(1) of the Bombay Police Act.

2. The Appeal was admitted on 27th March, 1995. In the facts and circumstances of the case and with the consent of the learned counsel for the parties, this Appeal is being finally heard and disposed of today.

3. Briefly stated, the case of the prosecution is that a complaint was filed by PW 1, Tidabhai Jivabhai, on 20th March, 1993, to the effect that when he was sleeping at home at night, at about 3:00 a.m., his wife woke him up saying that some noise and shouting is going on in the nearby hut of Mohanbhai. The complainant came out of his house and went to the house of Mohanbhai, who had expired five years previously. The wife of Mohanbhai, along with her children, was living in the said house. On going there, the complainant found Labhuben (PW 3) and the accused present there. The accused was quarreling with Labhuben. As stated in the complaint, on asking the accused why he was fighting with Labhuben, the

accused got excited and started abusing the complainant. Thereafter, the accused took out a knife from his pant and gave a knife blow to the complainant who, in order to save himself, raised his arm and sustained a cut with the knife on the wrist of his left hand. It is further stated that on hearing the commotion, Harsukh Visa, Vinu Moti, Lala Magan and all, who were living in the neighbourhood of the complainant, came there and the accused went away while uttering abuses. Thereafter, the complainant went to the Police Station and filed the complaint.

4. On filing of the complaint, as above, the investigative machinery was set into motion. The Panchnama of the scene of offence was prepared, the statements of witnesses were taken, and after investigation was over, the Chargesheet came to be filed against the respondent. The Charge (Ex.4) dated 22nd July, 1993, was framed against the accused. The Charge was read over and explained to the accused, who pleaded “not guilty” to the same and claimed to be tried. Accordingly, the case was put to trial. In support of the case of the prosecution, as many as twelve

witnesses were examined. After the recording of evidence of the prosecution witnesses was over, the learned trial Judge explained to the accused, the statements appearing against him in the evidence of the prosecution witnesses and recorded his statement under Section 313 of the Code of Criminal Procedure, 1973. The defence of the accused was of total denial and it was stated that a false case has been thrust upon him. After having appreciated and evaluated the evidence on record, the learned trial Judge recorded a finding of acquittal, giving the accused the benefit of doubt, which has given rise to the present Appeal.

5. This Court has heard Mr.L.B.Dabhi, learned Additional Public Prosecutor for the appellant-State and Mr.Hardik S.Soni, learned advocate on behalf of Mr.Harin P.Raval, learned counsel for the respondent, at length and has also perused the record and proceedings of the case which have been summoned from the trial Court.

6. Mr.L.B.Dabhi, learned Additional Public Prosecutor, has submitted that the judgment and order of the trial

Court is contrary to the weight of evidence on record which has not been properly appreciated. He has submitted that the trial Judge has wrongly recorded a finding of acquittal when there is sufficient evidence on record in the shape of testimonies of the complainant (PW 1), his wife Viruben (PW 2), and Labhuben (PW 3), who were present at the spot when the incident took place. He has further submitted that the medical evidence also supports the case of the prosecution, and if there are any discrepancies in the testimonies of witnesses, they are minor in nature and cannot shake the case of the prosecution. According to the learned Additional Public Prosecutor, other Prosecution Witnesses have also supported the case of the prosecution and in this view of the matter, the Appeal deserves to be allowed and the judgment of the trial Court is required to be set aside.

7. On the other hand, Mr.Hardik S.Soni, learned counsel for the respondent, has urged that the trial Court has rightly appreciated the evidence on record and the reasons recorded by it for recording a finding of acquittal are reasonable and cogent. He has submitted

that there are glaring contradictions in the testimonies of the Prosecution Witnesses which go to the root of the matter. Therefore, the respondent has rightly been acquitted by the trial Court. Mr.Hardik S.Soni has further argued that this being an Appeal against the order of acquittal, the judgment and order rendered by the trial Court deserves to be upheld as proper and plausible reasons for acquittal have been recorded. He has, therefore, prayed that the Appeal be dismissed.

8. In the above background, after having perused the contents of the complaint, as referred to hereinabove, and considering the submissions of the learned counsel for the parties, it is necessary to evaluate and re-appreciate the evidence recorded by the trial Court and the reasons assigned for acquittal by briefly summarizing the salient features of the depositions of the Prosecution Witnesses and other evidence on record.

9. Prosecution Witness No.1, Tidabhai Jivabhai, is the complainant and his testimony is to be found at Ex.8.

He states that Viruben (PW 2) is his wife and Mohanbhai is his cousin brother. According to him, the incident took place at 3:00 a.m. in front of his house when he was asleep. He was woken up by his wife since there was a commotion in the house of Mohanbhai and on going there, he asked the accused, who was present there, why he was fighting. On this, the accused got excited, and taking out a knife from his pant, ran behind the complainant. According to the testimony of this witness, the accused gave a knife blow and on his stopping the blow by raising his arm, he sustained a cut on the wrist of his left hand. He further states that his wife came in between and in the process, sustained a knife injury on her fingers. This witness further narrates that Vinu Moti, Hansraj Visa and Lalbhai came and separated the accused, who then ran away. PW Tidabhai further states that since the incident took place at night, he could not identify the knife. He identified the accused since they were neighbours. According to PW 1, they went to the hospital at 3:30 a.m. and then went to the Police Station to file the complaint which is at Ex.9.

In his cross-examination, this witness states that he took treatment for his injury at about 4:00 a.m., before which he had informed the Police about the incident. According to this witness, he has stated in the Police complaint that his wife intervened and sustained a knife injury on her fingers.

10. Prosecution Witness No.2, Viruben, who is the wife of the complainant, is examined at Ex.10. She states that Mohanbhai is her brother-in-law (husband's younger brother) and Labhuben is her sister-in-law. She states that the incident took place at 3:00 a.m. in front of her house and on hearing the fighting, she got up, woke up her husband, and both of them went there. According to this witness, her husband told the accused to go out from the house of Mohanbhai but the accused started fighting and took out a knife with which her husband sustained injury on the wrist of the left hand. This witness states that she tried to intervene and sustained a cut on two fingers of her right hand. This witness further states that at that time, Hansraj Visa and others came there and the accused went away. PW 2 states that at 3:30 a.m.,

they went to the Police Station and from there they went to the Government Hospital at Kalawad for treatment. Labhuben was in the house at that time. In her cross-examination, PW Viruben states that she has stated to the Police that she went to the spot with her husband. She has denied that she was in her house at the time of incident. This witness has reiterated that she took treatment for the injury sustained by her at 4:00 a.m. and that Hasmukhbhai Palabhai and others came later on.

11. Prosecution Witness No.3, Labhuben, who is supposed to have witnessed the incident, has been examined at Ex.11. She states that Mohanbhai and the complainant are her brothers-in-law (husband's younger brothers). This witness states that the incident took place at 3:00 a.m. when the accused came to the house of her sister-in-law Savita. She states that she was also sleeping in the house at that time and the accused ordered that the door be opened and on the door not being opened, he dashed it open and the door fell down. This witness further narrates that the accused then gave her two slaps on her cheek and at that time,

her brother-in-law Tidabhai (PW 1) and his wife came there. The accused gave abuses and took out a knife with which he gave a blow to Tidabhai. This witness states that the accused locked her sister-in-law in the house and gave a knife blow to her other sister-in-law Viruben (PW 2) who sustained injury on the fingers of her right hand. In her cross-examination, this witness denies that she has stated to the Police that the accused gave her two slaps on the face. She also denies that she took any treatment. According to this witness, on hearing the noise, PW 2 came first and PW 1 followed. This witness states that the incident took place at about 2:30 or 3:00 a.m. and her sister-in-law (PW 2) went to wake up her husband (PW 1) who came later on. She further states that she was in the hut with the accused. This witness has further stated in her cross-examination that at that spot, it was dark and she could only recognize the accused from his face but did not see him. She has also admitted that at the time of the incident, Viruben (PW 2) was not present at the spot.

12. Prosecution Witness No.4, Vinubhai Motibhai, is

examined at Ex.12. This witness states that the incident took place at 3:00 a.m. in the house of Savita Mohan. According to this witness, on hearing the noise and going to the spot, she saw that Tidabhai was injured with a knife. She was told by Tidabhai that the accused had given a knife blow to him. At that time, the accused was hovering nearby the spot. This witness states that she could not see clearly since she was far away and the weapon looked like a knife. According to this witness, Viruben (PW 2) sustained injury on her fingers. In her cross-examination, this witness states that she was told about the incident by PW 1 and was not present on the spot at the relevant point of time. She has denied that she saw a weapon like knife in the hands of the accused.

13. Prosecution Witness No.5, Harsukh Visha, has been examined at Ex.13. His testimony is not very relevant since he has not witnessed the incident. He states that when he went to the spot, he saw a knife in the hands of the accused, who was abusing PW 1. According to him, the accused went away after being pacified by him. On asking PW Tidabhai, this witness was

informed that the accused gave a knife blow which resulted in the injury on the hand of the PW 1.

14. Prosecution Witness No.6 is Dr.Rakhalchandra Bhupeshchandra Datta, and his testimony is to be found at Ex.14. This witness states that at 5:05 hrs. on March 20, 1993, he examined the complainant Tidabhai and found a cut on his left hand measuring 2x1x1 inch. On the same day, he also examined Viruben (PW 2) who had a cut on the small finger of her right hand measuring 3x2x1 inch. According to him, both these injuries could have been inflicted with a knife. In his cross-examination, this witness categorically denies that PW Tidabhai came to take treatment at 4:00 a.m. He also denies that Viruben did not come to take treatment at 12:00 a.m. This is contradictory to the version given by PW 1 and PW 10, the investigating officer. It is further denied by him that Tidabhai sustained an injury on his left wrist and that Viruben had sustained injuries on two forefingers of her right hand. Further, the doctor denies that both the injured persons came to take treatment separately. He has categorically stated that

the injuries sustained by both the injured witnesses were inflicted 10 to 12 hours before they came for treatment and were simple in nature. According to this witness, such injuries could have been sustained by dashing against the door of a bus while climbing or getting off the same.

15. Prosecution Witness No.7, Kishan Babubhai, who has been examined at Ex.17, is one of the Panch Witnesses of the scene of offence, which is at Ex.18. In his cross-examination, he has stated that he has not given any details about the contents of the Panchnama to the Police and he was made to sign on a Panchnama which had been prepared earlier. According to this witness, it is not written in the Panchnama that the door of the hut was broken and had fallen down and blood stained clothes were lying there. The testimony of this witness is of no help to the case of the prosecution.

16. Prosecution Witness No.8, Lalbhai Maganbhai, has been examined at Ex.19. This witness has no personal knowledge of the incident nor was he present at the

scene of offence. According to this witness, he was informed about the incident by his mother. He has categorically stated in his cross-examination that he has no personal knowledge regarding the incident.

17. Prosecution Witness No.9 is the Head Constable Kunjbihari Mohanprasad and his testimony is to be found at Ex.21. Similarly, Prosecution Witness No.10, Gumansinh Nagubha, is the investigating officer. In his testimony at Ex.22, this witness has stated in cross-examination that he came to know about the incident at 5:00 a.m. and he himself sent the injured to the hospital for treatment. He has stated that he did not recover any Muddamal from the spot. This witness has stated in cross-examination that the FIR was registered at 4:30 a.m. and that Viruben and Tidabhai had taken treatment on the night of the incident. He has denied that Viruben took treatment at 12 o'clock the next day.

18. Prosecution Witness No.11, Vinod Desabhai, who has been examined at Ex.23, is one of the Panchas of recovery of the weapon. He states that the Police took

his signature on the Panchnama at the Bus stand. This witness has been declared hostile by the prosecution.

19. Prosecution Witness No.12, Vinod Dudabhai, is also one of the Panch witnesses of the recovery of knife. In his testimony at Ex.25, he states that when he was called to the Police Station on 26th March, 1993 at 12:30 noon, no other Panch was present. He was then made to sign on the Panchnama of the recovery of knife which is supposed to have been recovered from the accused. In his cross-examination, this witness states that he is working in the Home Guards and is regularly going to the Police Station. He also states that nothing was written in the Panchnama at his instance and he has only signed it and beyond that he does not know anything.

This, in totality, is the evidence brought on record by the prosecution.

20. The discussion of the evidence reproduced hereinabove reveals that even though it appears that some altercation or quarrel took place at the house of

Mohanbhai at night, the true version regarding how the incident started or unfolded has not been brought on record. The complainant (PW 1) Tidabhai, in his complaint, does not mention that his wife Viruben (PW 2) also went to the spot of the quarrel with him. However, in his testimony, he states that his wife tried to intervene and sustained injuries with the knife on her fingers. There are several improvements and embellishments in the testimony of the complainant over and above what is stated in the complaint. In his testimony, the complainant has stated that the accused ran after him with the knife which fact does not find mention in the complaint.

21. In fact, different prosecution witnesses give different versions of the same incident. According to the testimony of Tidabhai, the accused and he were separated by Hansraj Visha and Lalbhai Maganbhai, but according to the testimony of Lalbhai Maganbhai, (PW 8), the complainant and the accused were standing there with the knife in his hand. PW Lalbhai has categorically stated that he has no personal knowledge of the incident and he was not present at

the spot. According to PW 5, Hasmukhbhai Vishabhai, when he came to the spot where the incident took place, the accused was standing with a knife in his hand and on his pacifying the accused, he went away. The conflicting versions of the same incident given by the Prosecution Witnesses cast a shadow of doubt on the veracity of their testimonies.

22. There are material contradictions in the testimonies of the complainant (PW 1) and his wife (PW 2). The complainant, in his deposition states that he had gone to the hospital at 3:30 a.m. and from there, had gone to the Police Station. PW 2, Viruben, states that they had first gone to the Police Station and then to the hospital. The FIR has been recorded at 4:30 a.m. The investigating officer, PW 10, has stated that the complaint was given at 4:30 a.m. Viruben has categorically stated that she went to the Hospital on the next day at 12:00 noon but this statement is belied by the testimony of PW Tidabhai and of the investigating officer. There are contradictory versions given in the evidence of prosecution witnesses about the presence of Viruben (PW 2) at the scene of

offence. She states that she went there along with her husband whereas PW 3 Labhuben states that Viruben came first and then went to wake up Tidabhai who came later on.

23. The medical evidence, though reveals some injuries on the person of PW 1 and PW 2, does not fully support the version of the prosecution. PW Tidabhai has stated that he sustained an injury on the wrist of his left hand whereas an injury is found on the left forearm. PW Viruben states that she sustained injuries on the two fingers of right hand whereas only one injury has been found on the finger of the right hand. The most important aspect which emerges from the testimony of the medical officer (PW 6) who examined and treated the injuries of PW 1 and PW 2 is that he has categorically stated that the injuries found on the person of PW 1 and PW 2 have been sustained by them over ten to twelve hours prior to his examination. This itself leads to a doubt whether these injuries were sustained during the incident at all.

24. The version of the so-called eye-witness PW 3, Labhuben, is also doubtful. She gives a totally different colour to the entire story. According to this witness, the accused dashed the door and broke it down. The Panchnama of the scene of offence (Ex.18) records that the hut where the incident took place had one door. It is nowhere recorded that this door was broken or had fallen down in a broken condition. PW Labhuben also states that the accused gave two slaps on her face which is not revealed by any of the prosecution witnesses. This witness also states that since it was dark, she did not see the accused but recognized him from his voice. Her testimony makes it doubtful that she has seen the weapon of offence in the hands of the accused. Prosecution Witness No.11, the Panch witness of the scene of offence, has been declared hostile. Moreover, the witness of the recovery of the knife also does not fully support the case of the prosecution. Moreover, all the prosecution witnesses are close relatives of the complainant and PW 2.

25. The fact that the prosecution witnesses are related to

the complainant, in itself is not sufficient to disbelieve their testimony if it is otherwise clear, consistent and truthful since, being relatives, they may be natural witnesses available on the spot at the time when the incident took place. However, in this case, it is seen that all the prosecution witnesses have given different versions of the same incident. There are material discrepancies and contradictions in their testimonies which when read together, do not give a consistent, truthful or clear picture at all. A cumulative reading of their testimonies does not throw any light on how the actual incident took place and how the accused is connected with the commission of the offence. Giving of knife blow to PWs 1 and 2 by the accused has not been proved by the prosecution, beyond a shadow of doubt. The so-called eye witness, Labhuben, has stated that it was dark and she could not see either the accused or the knife clearly. In fact, the inconsistencies and discrepancies which have cropped up in the evidence of the prosecution witnesses, go the very root of the matter. The testimony of the Doctor, PW 6, makes it

evident that the injuries sustained by PWs 1 and 2 are of ten to twelve hours prior to the incident. According to the version of the prosecution, the complainant and PW 2 went immediately to the hospital at 3:30 a.m. to get their injuries treated. This belies the medical evidence, which has gone unchallenged.

26. When the entire genesis of the incident and the role supposed to have been played by the accused is shrouded in doubt and when there is no clear evidence to connect the accused with the commission of the offence, it cannot be said that the trial Court has committed any error in acquitting the accused by giving him the benefit of doubt. It has to be kept in mind that this is an Appeal against acquittal and unless the reasons assigned by the Trial Court for acquittal are perverse, legally unsustainable or highly improbable, the Court would be slow to interfere. In the instant Appeal, this Court finds that the reasons given by the trial Court are plausible, cogent and convincing. Moreover, when it is possible to arrive at two views on the basis of the evidence on record, then the view favourable to the accused should be adopted.

27. In the ultimate analysis, this Court does not find any valid or justifiable ground to interfere with the judgment and order of the trial Court. For the foregoing reasons, the Appeal is dismissed.

(Smt.Abhilasha Kumari, J.)

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